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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1111

UNITED STATES STEEL COMPANY,

Petitioner,

—v.—

MOSES DICKERSON, MILLARD STARLING, EDDIE WILLIAMS, INTERNATIONAL UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 4889, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 5092, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 8050, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 5116, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 2670, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7246, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 567, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 510, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7900, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7420, UNITED STEEL WORKERS OF AMERICA (AFL/CIO),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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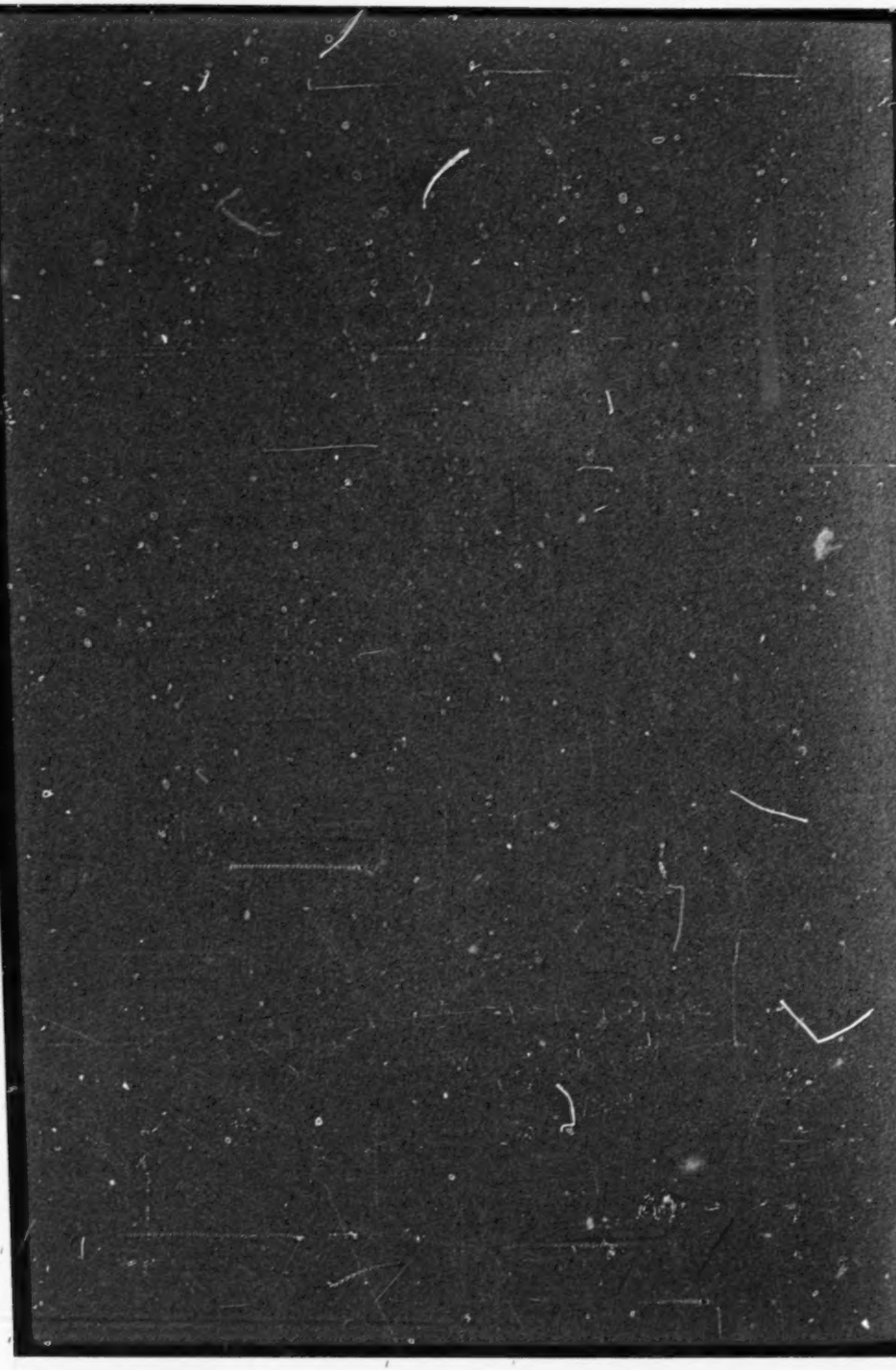

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TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents Moses Dickerson, Millard Starling and Eddie Williams, on behalf of themselves and others similarly situated, oppose the petition for writ of certiorari

entered in this Court on March 6, 1975 by petitioner, United States Steel Company, requesting review of an Order of the United States Court of Appeals for the Third Circuit.

Respondents are plaintiffs in a class action alleging race discrimination in employment by petitioner United States Steel Company. In the Order which the petitioners seek to have reviewed, the Circuit Court granted plaintiff-respondents' motion to quash the Petitioners' appeal from a District Court Order certifying the case as a class action.

For the reasons set forth in this brief, the judgment of the Circuit Court should not be reviewed before final disposition by the District Court. There is no jurisdictional basis for the requested action, nor would such review be appropriate under the Supreme Court Rules.

OPINIONS BELOW

The relevant opinions below are accurately presented by petitioners in the Petition for Writ of Certiorari before the Court in this case.

JURISDICTION

The Court lacks jurisdiction to grant the request of petitioners for writ of certiorari, because this case has never been properly in the Court of Appeals for the Third Circuit. The statutory provision which petitioner cites as conferring jurisdiction to entertain its petition applies only to cases properly in the Court of Appeals. 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules involved have been accurately presented by petitioner in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

(1) Is an appeal from an order granting class action status under Rule 23(b)(2) of the Federal Rules of Civil Procedure in a case of race discrimination in employment premature and without jurisdictional basis?

(2) Does the Petition offer any special or important reasons for granting certiorari?

STATEMENT OF THE CASE

Respondents Dickerson, Starling, and Williams have brought a class action complaint for race discrimination in employment at the Fairless Hills plant of petitioner U.S. Steel. All three respondents were employed at the Fairless Hills plant when they filed their complaints at the Equal Opportunity Employment Commission in October and November of 1971. In May of 1973, respondents received notice from the EEOC of their right to sue petitioner in federal district court. Shortly thereafter, they filed a class action complaint.

The motion of plaintiff-respondents to have their case certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure was granted by Judge Clarence Newcomer of the Eastern District of Pennsylvania on September 16, 1974. Petitioners attempted to appeal the class action Order to the United States Court of Appeals for the Third Circuit, but the motion of plaintiff-respondents to quash that appeal was granted by an Order of the Circuit Court on January 7, 1975.

United States Steel's subsequent Petition to the Third Circuit for Rehearing and Suggestion for Rehearing was denied on February 7, 1975. The case is now proceeding with discovery in the District Court. Plaintiffs have filed interrogatories which seek to expose the racial profile of the employee groups at the United States Steel's Fairless Hills plant, in order to prove a *prima facie* case of discrimination on both the individual and class claims. Although petitioner is dissatisfied with the outcome of respondents' motion for class action certification, there is no basis for petitioner's attempt to have its appeal heard before final disposition by the District Court. Accordingly, and for the reasons which follow, United States Steel's Petition for Writ of Certiorari to the Third Circuit should be dismissed or denied.

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION OF UNITED STATES STEEL BECAUSE THE DISTRICT COURT'S ORDER GRANTING CLASS ACTION STATUS IS NOT APPEALABLE UNDER 28 U.S.C. SECTION 1291.

The threshold jurisdictional question before the Court is whether the September 16, 1974 Order of the District Court was an appealable order, and whether this case was properly in the United States Court of Appeals when the petition for certiorari was filed. 28 U.S.C. Section 1254; *United States v. Nixon*, 94 S. Ct. 3090, 3098, 3099 (1974). Petitioner's attempt to establish jurisdiction must fail by application of well-worn principles. 28 U.S.C. Section 1291 grants jurisdiction to the courts of appeals to review only "final decisions of the district courts." Because a decision granting class action

status in a race discrimination case is neither a final decision, nor a decision appealable under the collateral order doctrine discussed below, the case was never properly in the Circuit Court for the purpose of 28 U.S.C. Section 1254(1).[1] Consequently, it cannot be properly before this Court by petition for writ of certiorari.

To appeal a class action certification under 28 U.S.C. Section 1291 by application of the "collateral order doctrine" set forth in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and invoked by United States Steel in the petition for Writ of Certiorari, the petitioner must show that it has a claim of right which is independent from the cause itself. *Cohen v. Beneficial Finance Corp.*, 337 U.S. 541 (1949). Because even individual Title VII cases are by their very nature class actions, petitioner's attempt to separate the class question for appeal purposes must fail. *Kohn v. Royall, Koegal and Wells, supra, Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 28 (C.A. 5, 1968), *Bowe v. Colgate*, 416 F.2d 711 (C.A. 7, 1969); See also *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1969); *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (C.A. 5, 1968).

The patterns of racial discrimination alleged by the respondents are the gravamen of both their causes of action and the common questions of law and fact relied upon by Judge Newcomer in certifying the class action

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[1] It is clear that the class action determination entered by the District Court is not "fundamental" to the further conduct of this case. Petitioner candidly admits that the respondents' individual cases, unlike the plaintiff in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), will proceed notwithstanding the class action determination. See, *Kohn v. Royall, Koegal and Wells*, 496 F.2d 1094 (C.A. 2, 1974).

under Rule 23(b)(2). *Wetzel v. Liberty Mutual Insurance Co.*, ___ F.2d ___, 9 FEP Cases 211, 9 EPD ¶9931 (C.A. 3, Jan. 23, 1975). As noted in *Kohn v. Royall, Koegal and Wells, supra;* a review of the district court's order certifying the class would take the Court "far into the merits" of the race "discrimination charge." In short, the class question and the cause of action in the instant case are so intimately entwined that in no way could they satisfy the *Cohen* requirement for severability for appeal.

II.

IF CONSIDERED ON ITS MERITS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Even if the Court does find jurisdiction to entertain the petition for writ of certiorari, the petition should be denied according to Supreme Court Rule 19 because there is no special or important reason for the Court to review the question presented.

Although Petitioner claims that the refusal of the Circuit Court to hear its appeal is too important to be denied review for a number of reasons, none of those reasons is sufficiently significant to merit consideration on petition for certiorari.

Petitioner first points to the additional costs of discovery which it will incur if the case proceeds as a class action rather than as an individual claim. Since the statistics as to petitioner's overall employment policies and practices are relevant and admissible in an individual Title VII complaint of race discrimination, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804, 805 (1973), the scope of discovery is not significantly broadened by the Order granting class action status. Whether respon-

dents' complaint is ultimately tried as a class action or as a group of individual claims, U.S. Steel will be presented with an ordinary employment discrimination case calling for all the cumbersome discovery which every Title VII action unavoidably entails.[2] *Kohn v. Royall Koegal, and Wells, supra.* Petitioners will gain no protection against the costs of deciding the suit by a reversal of the District Court's Order, nor will petitioner suffer prejudice if the same Order is permitted to stand. Furthermore, petitioner should be able to respond rather easily to the interrogatories which it cites as burdensome. As a federal contractor subject to the Office of Federal Contract Compliance requirements laid out in 41 C.F.R. Section 60-1.40 and 60-2.10 through 2.13 (OFCC Revised Order 4), petitioner has already been required to compile much of the information called for in the questions relating to class allegations, and should be able to reorganize the data for the purposes of this litigation without substantial hardship.[3]

Thus, because statistical evidence is discoverable whether this case proceeds as an individual or a class action, and because production of class-wide statistics will in

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[2] The District Court has already implicitly acknowledged that expansive discovery is inevitable. In January, 1975 the Court informally agreed that the case of *Curtis Worthy v. United States Steel* (C.A. No. 74-2689, E.D., Pa) would be consolidated with respondents' cases for purposes of discovery.

[3] Even if petitioner had to compile the requested information from raw data, petitioners' estimate of the cost of the job at One Hundred Thirty-five Thousand Dollars ($135,000) (Affidavit of S.G. Clark, Jr., page A3) would be excessive. Mr. Clark includes the work of a broad range of personnel in his estimation, but his figures indicate the average hourly wage of those working to be $16.875, yielding an average annual salary of well over Thirty-five Thousand Dollars ($35,000).

substantial part subject petitioner to burdens which it has born before, the question of whether petitioner is entitled to review of the class action determination is a question of almost no consequence where discovery costs are concerned.

Petitioner goes on to argue that the decision granting class action status is too important to be denied review, because of the possibility that petitioner will be subject to relitigating the issues which have been resolved by the Steel Industry Consent Decrees in *United States v. Allegheny Ludlum Industries Inc.*, Civil Action No. 74-339 (N.D. Ala. April 12, 1974). *Rodriguez v. East Texas Water Freight*, 505 F.2d 40 (C.A. 5, 1974). Apparently, Petitioner totally ignores respondents' judicially approved right to pursue, examine and challenge the purported resolution of unlawful race discrimination under the Steel Industry Consent Decrees. *Williamson v. Bethlehem Steel*, 468 F.2d 1201 (C.A. 2, 1972), *cert. den.* 411 U.S. 939 (1972). In addition, to the extent that respondents elect not to retread the successful paths pursued by the Federal Government, respondents are not currently in a position to do so since petitioner has consistently refused to reveal information to respondents about the Fairless Works which would enable respondents to segregate those of their claims which have been disposed of by the nationwide Steel Industry Consent Decrees. While the Consent Decrees may have mooted some of Respondents' claims, without class-wide discovery, respondents are powerless to co-operate with petitioner along this line. Petitioner would better save its own interest by allowing discovery than by guarding information which would obviate the need for relitigation of settled issues.

Undoubtedly, Supreme Court Rule 19 calls for considerable more serious ramifications than those presented

by the instant case for the exercise of this Court's discretion to entertain a petition for certiorari. *See, e.g., Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 937, 579, 584 (1952); *United States v. United Mineworkers*, 329 U.S. 708, 709, 710 (1946), 330 U.S. 258, 269 (1947).[4]

CONCLUSION

For the foregoing reasons, respondents request this Court to dismiss the Petition for Writ of Certiorari for lack of Jurisdiction. If the Court finds jurisdiction to entertain the Petition, respondents request that the Petition be denied.

Respectfully submitted,

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[4] Indeed reference to the defects which petitioners wish to raise on the merits concerning the certification of respondents as the class representatives reflects that U.S. Steel is committed to delaying compliance with Title VII of the Civil Rights Act and in so doing has included in its corporate quiver the presentation to this Court of what are now the most frivolous of issues. See for example: fn. 1 in Justice White's dissenting opinion in *Sosna v. State of Iowa*, No. 73-762, 43 L.W. 4125, 4132 (1975), approving the case law relied upon by the District Court to certify the respondents as class representatives. In view of the frivolous nature of Petitioner's request for review, respondents urge the Court to exercise the sanction of double costs permitted under this Court's Rule (7). Such sanctions are particularly appropriate under Title VII where enforcement of Title VII is dependent in part upon private attorneys general.